FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 7 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1942.

No. 66.

EMIL H. STRASSBURGER, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMICI CURIAE.

NATHAN BILDER,
WALTER J. BILDER,
ERWIN N. GRISWOLD,
Amici Curiae.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

INDEX.

	Page
Argument	
I. The generality of the statute	2
II. The construction of the statute	4
A. A general statute need not be construed to reach to the limits of Congressional power	4
B. Even though Congress can impose an excise tax on stock dividends, it does not follow that they are taxable under a statute imposing the tax on income	7
Conclusion	11

CITATIONS.

Constitution:	
Art. I, Sec. 8	3, 9, 10
Sixteenth Amendment	7, 9, 10
Cases:	
Burnet v. Wells, 289 U.S. 670	5
Douglas v. Willcuts, 296 U.S. 1	5
Dreyfuss v. Manning, 44 F. Supp. 383	1
Eisner v. Macomber, 252 U.S. 189	6, 7, 9
Field v. Clark, 143 U.S. 649	3
Hampton, J. W., Jr. & Co. v. United States, 276 U.S. 394	3
Helvering v. Bruun, 309 U.S. 461	7
Helvering v. Clifford, 309 U.S. 331	5
Helvering v. Horst, 311 U.S. 112	5
Koshland v. Helvering, 298 U.S. 441	6, 9, 10
Lucas v. Alexander, 279 U.S. 573	10

	Page
Reinecke v. Northern Trust Co., 278 U.S. 329	10
Strassburger v. Commissioner, 124 F. (2d) 315	8
Towne v. Eisner, 245 U.S. 418	6
United States v. La Franca, 282 U.S. 568	10
Statutes:	
Revenue Act of 1934, § 115(f)	6
Revenue Act of 1936, § 115(f)(1)	2, 8
Internal Revenue Code, § 167	5
Miscellaneous:	
House Report No. 2475, 74th Congress, 2d Session, p. 10	6
Senate Report No. 2156, 74th Congress, 2d Session, pp. 18-19	6

Supreme Court of the United States.

OCTOBER TERM, 1942.

No. 66.

EMIL H. STRASSBURGER, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMICI CURIAE.

This brief is filed by counsel who represent the taxpayer in the case of *Leonard Dreyfuss* v. *John E. Manning, Collector*, 44 F. Supp. 383, in which an appeal by the Government from the decision of the District Court for the District of New Jersey is now pending before the Circuit Court of Appeals for the Third Circuit. That case involved a distribution of preferred stock made by a corporation which had only common stock outstanding, all of which was owned by one person. The District Court held that it was not a taxable dividend.

It is not the purpose of this brief to examine the several authorities bearing upon the taxability of stock dividends. It is rather intended to suggest some arguments relating to

the construction of the statute involved in this case. That statute is § 115(f)(1) of the Revenue Act of 1936, which reads as follows—

> A distribution made by a corporation to its shareholders in its stock or in rights to acquire its stock shall not be treated as a dividend to the extent that it does not constitute income to the shareholder within the meaning of the Sixteenth Amendment to the Constitution.

I.

The Generality of the Statute.

This statute does not define in terms the stock dividends which shall be taxable. It does not say "All stock dividends shall be taxable." It does not say "All stock dividends shall be taxable when they are paid in a different class of stock from that previously outstanding." It does not say "All dividends paid in preferred stock to the holders of common stock shall be taxable even though only common stock was outstanding and that was held by a single person." It does not say that "Stock dividends shall be taxable when they give the stockholder a different proportionate interest than he had before." It does not say that "Stock dividends shall be taxable when they give the stockholder a different interest, regardless of any change in proportionate interest." On the contrary, what it does say is that whether a stock dividend is taxable shall depend upon the views which this Court may take of the meaning of the word "income" in the Sixteenth Amendment, without any expression by Congress itself as to what it regards as the extent of its powers under that Amendment.

In the allocation of the powers of Government, certain matters have been regarded as basically legislative. These

include the power to define crimes, and to determine the limits of punishment for crimes. The power to levy taxes has also been a peculiarly legislative power. It is the first power conferred expressly upon "The Congress" by Article I, Section 8, of the Constitution. Of course, this does not mean that Congress cannot make delegations of authority with respect to taxes. Such delegations to administrative officers are frequent and familiar. Cf. *Field* v. *Clark*, 143 U.S. 649; *J. W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394; and the powers of the Commissioner of Internal Revenue to make regulations. But in all of these cases, the responsibility is on Congress. The duties of the officers to whom delegations are made are to ascertain facts, or to prescribe details within "canalized" limits. They do not purport to delegate the determination of an ultimate question of constitutional power.

It may be said that the delegation here is made in effect to the judiciary, and it is the function of the judiciary to determine questions of constitutional law. It is the function of the judiciary to construe statutes, to determine as near as may be what was the meaning of the legislative authority. But it is not the function of the judiciary to rewrite statutes, to give them meaning when the Congress has not undertaken itself to draw the lines to which its legislation shall apply. If Congress says such and such shall be taxable, it is the function of this Court to determine whether that falls within the Congressional power. But if Congress says, we levy a tax on what we can, and leave it to the courts to determine, Congress has not fulfilled its responsibility under the Constitution to "lay" taxes.

It is certainly clear that Congress could not validly pass a general statute saying in substance, "There is hereby imposed a tax on every subject to which our constitutional powers extend." The present statute is not as broad as

this. It relates to only one aspect of constitutional power in the taxation field. But on the matter to which it does relate, it lays down no judgment of Congress as to the extent of its power. It leaves the Court the duty not of determining the validity of a power exercised by Congress, but of determining the extent of Congressional power when Congress has made no determination itself. This Court is entitled to have the judgment of Congress on the question how far Congress thinks its powers under the Constitution extend.

II.

The Construction of the Statute.

A. *A General Statute Need Not Be Construed to Reach to the Limits of Congressional Power.*

The Court would hardly hold that a statute such as this was unconstitutional. The question of the proper construction of the statute which Congress has enacted must, however, be decided. Though every possible presumption should be exercised in favor of the constitutionality of a statute, there is no similar rule as to the construction of the statute. If Congress choses to legislate in indefinite and uncertain terms, there is no obligation on the courts to push the words used to extreme limits. Indeed, the obligation is to the contrary.

The question presented in this case, therefore, is not the same as it would have been if Congress had legislated specifically that "All stock dividends shall be taxable." In such a case there would have been no question of construction, but merely a question of the validity of the power which Congress had purported to exercise. But under the statute which Congress did pass, there is a question of construction, and this question of construction may well be

affected by a proper regard for the separation of powers. In other words, this Court may find as a matter of construction that the present statute should not be pushed to a point which the Court would find within Congressional power if Congress had expressly so provided in the statute.

The point may be illustrated by an example. Congress might enact a statute, analogous to the one here involved, providing that "All income shall be taxed to a person to the extent of the constitutional power of Congress to tax it to him." Under such a statute, assuming its validity, it seems likely that this Court would find that the income of a revocable trust was taxable to the settlor. It might easily reach the result of *Helvering* v. *Clifford*, 309 U.S. 331, or of *Douglas* v. *Willcuts*, 296 U.S. 1. It is very likely that it would reach the result of *Helvering* v. *Horst*, 311 U.S. 112. But it is submitted that there are situations to which the Court would not apply such a statute, although it would sustain the power of Congress to enact a statute applying to these situations in terms. Thus, in 1924, Congress enacted the provision which is now found in § 167 of the Internal Revenue Code, and which taxes to the settlor the income of a funded insurance trust, although the trust is completely irrevocable and the settlor retains no interest in the trust property, no control over the income, and no other relation to the situation. This express statute was sustained by this Court in *Burnet* v. *Wells*, 289 U.S. 670. It seems at least doubtful whether the income in question in that case would have been held taxable to the settlor under a statute phrased in general terms, as at the beginning of this paragraph. If those doubts are well taken, then the point is made that a general statute of this sort will not exhaust the powers of Congress and will not reach all situations which Congress might itself reach by words expressly chosen for that purpose.

We submit that that is the situation here. When Congress enacted the statute in question it displaced a prior provision which had been in effect for many years, and which provided that "A stock dividend shall not be subject to tax." Section 115(f) of the Revenue Act of 1934. This Court's decision in *Koshland* v. *Helvering*, 298 U.S. 441, showed that the prior statute did not tax certain dividends which might be taxed. It was therefore proper that Congress should seek to tax such dividends. But the *Koshland* case involved a situation where the dividend caused a change in the *proportionate* interests of the shareholders. Congress did not express any clear intent to go farther. Its committee reports are perfectly blank as to the extent to which it thought its general statute did go. See House Report No. 2475, 74th Congress, Second Session, p. 10; Senate Report No. 2156, 74th Congress, Second Session, pp. 18-19. These merely repeat the general language of the statute. The statute does not disclose any express intention to reach the result which was held to be beyond the power of Congress in *Eisner* v. *Macomber*, 252 U.S. 189. *Indeed, the form of the statute indicates plainly the understanding of Congress that there were some stock dividends which it did not have the power to tax.*

We submit that the Court is under no obligation to construe this general statute so as to push the power which Congress has exerted to the ultimate limits of the power which Congress could exert if it expressly undertook to exercise that power. Cf. *Towne* v. *Eisner*, 245 U.S. 418. Under all the circumstances, the only intention that Congress has clearly indicated is that the statute is to apply to stock dividends where there is a change in the *proportionate* interest of the shareholders, as in the *Koshland* case itself. Determination of the question whether Congress can apply the taxing power to the extreme case where there is no change in the proportionate interests of the shareholders,

and where as here there is at all times only a single shareholder—who owns everything, no more and no less, both before and after the transaction—may well be deferred until Congress makes plain its real intention that this Court must reëxamine the solemn determination of *Eisner* v. *Macomber*. If Congress choses to legislate in wholly general terms there is no need for this Court to treat the statute as a roving commission requiring the Court to go into fields where the Congress has not led the way.

B. *Even Though Congress Can Impose an Excise Tax on Stock Dividends, It Does Not Follow That They Are Taxable Under a Statute Imposing the Tax on Income.*

There is another, though related, argument on the question of construction. One of the contentions made by the Government in previous cases, as in the brief [1] and oral argument before this Court in *Helvering* v. *Bruun*, 309 U.S. 461, is, in substance, that a stock dividend may be taxed quite apart from the Sixteenth Amendment, because it is an event which is subject to an excise under the general taxing powers of Congress.

This is a *constitutional* argument. It is an argument that Congress *can* tax stock dividends whether they are income or not, because there is an *event* which Congress can tax. The opinion of the majority below seems to disclose that its conclusion was based in part on this ground. Prior to the transaction in question the petitioner owned all of the stock in the corporation, and he owned all of the stock after the transaction was completed. There was no change in the quantity of his aggregate interests. The conclusion that he was taxable arises from the occurrence of

[1] See pages 23-25 of the Brief for the Petitioner, in *Helvering* v. *Bruun*, No. 479, October Term, 1939.

a change in the quality of the petitioner's stockholdings. Thus the Court shows that what it views as taxable is not property or income but an event or process, namely, "the rearrangement of corporate capitalization" producing a change in the "character" or quality of the stockholder's "corporate ownership." *Strassburger* v. *Commissioner*, 124 F. (2d) 315, at 317. It is the transformation in the legal quality of the stockholding which is being taxed, not the product of that transformation. The total product of the transformation is quantitatively neither more nor less than what the petitioner owned before the change occurred. The difference is only qualitative. But the transforming process itself is obviously not property. It is a process or event, and hence does not constitute "income," which is a thing, or quantity. To tax the transforming process under the guise of taxing its product is to tax something which, although it may possibly be made the proper subject of taxation, is nevertheless not "income."

Thus, though a statute expressly taxing all stock dividends may be constitutional as imposing an excise on an event, that is not the question here. Before this dividend can be taxed, it must be held not only that Congress can tax it under the Constitution, but also that Congress has taxed it under § 115(f)(1) of the Revenue Act of 1936. *But that statute does not purport to tax all stock dividends which Congress can constitutionally subject to taxation.* It does not say "A distribution . . . shall not be treated as a dividend to the extent that it cannot be taxed under the Constitution." That is the way the Government would read it; and if it did so read, the Government's excise argument would be relevant. But as the statute was actually written, the excise argument is self defeating. For the actual provision of the statute is that a distribution shall not be taxable unless it is "income" within the Sixteenth Amendment. Thus, to say that Congress can tax stock

dividends under the general powers of Article I, Section 8, does not meet this case, for Congress, in the statutory language it has actually used, has not purported to exercise those powers. The argument based upon the general taxing powers of Congress is in substance and effect a concession that a stock dividend is not "income," and thus is not within the terms of this statute. For in this statute Congress has in terms undertaken to tax only those things which are income within the Sixteenth Amendment.

This may point the way to an orderly solution of the stock dividend problem. To continue to approach it in terms of "income" leaves us engulfed in a verbal sea. The concept of income cannot be precisely defined. In the stock dividend field, it extends to the situation where a shareholder has received something which changes his proportionate interests in the enterprise. That has been decided in *Koshland* v. *Helvering*, 298 U.S. 441. But it is a great strain to push the concept beyond that point to the situation where there is merely a *different* interest, in that there are more or different pieces of paper, but where there is no change at all in the *proportionate* interests of the shareholders, and especially, where, as here, there is at all times only a single shareholder. That strain is evidenced by *Eisner* v. *Macomber*, and by the nearly twenty years of practice that followed that case. Moreover, if the field is entered, the lines will be very hard to draw, and they will necessarily have to be drawn more or less arbitrarily. If a dividend of preferred on common, with no change of proportionate interest, is taxable, is a dividend of common on common taxable? And if it is, will a mere split-up of common stock result in taxable income? These are knotty questions, some of which the Government is already undertaking to raise. But there is no need for this Court to enter this verbal field, and to undertake the task of forcing the concept of income to new limits, if Congress can constitu-

tionally tax all stock dividends whether they are income or not. This statute taxes only those stock dividends which are income. This Court should feel under no compulsion to hold stock dividends taxable on the ground that they are income if it lies within Congressional power to tax them on other grounds.

Most of the constitutional argument in the stock dividend field has heretofore been cast in terms of income. In order to make stock dividends taxable, it was felt that they had to be regarded as income, and thus there has been great constitutional pressure on that word. But that pressure may be relaxed entirely if Congress has power under Article I, Section 8, to tax stock dividends whether they are income or not. On this basis, the question presented here is not one of constitutional law, but is solely one of statutory construction. The word which Congress used was "income." It can be given a very broad construction, or it can be given the ordinary construction which it has heretofore received, and which has not carried it yet in this Court's decisions beyond the limits of the *Koshland* case. If it were necessary to do so to uphold the constitutional power of Congress, it might be forcefully argued that the broad construction should be reached. But there is no such need to stretch the meaning of the word "income" if the ultimate powers of Congress to tax stock dividends does not turn on the meaning of that word. If Congress could tax all stock dividends if it wanted to and said so, the present statute which taxes only those which are income within the Sixteenth Amendment should be construed so as to avoid the difficult constitutional question as to the precise limits of that Amendment. Cf. *Lucas* v. *Alexander*, 279 U.S. 573, 577; *Reinecke* v. *Northern Trust Co.*, 278 U.S. 329, 348-349; *United States* v. *La Franca*, 282 U.S. 568, 574.

Conclusion.

Before any question of constitutionality need be faced in this case, the statute involved must itself be construed. The statute should not be construed to tax a stock distribution which does not change the proportionate interests of the shareholders, and particularly where, as here, all of the stock was at all times owned by a single shareholder. The statute is in general terms, and need not be construed as a specific direction to tax all stock dividends. Moreover, Congress did not purport to exert its general taxing powers, but only its powers with respect to income under the Sixteenth Amendment. To the extent that Congress may tax stock dividends as an excise on an event, there is no constitutional necessity to strain the meaning of the word "income" as applied to the facts of this case.

Respectfully submitted,

Nathan Bilder,
Walter J. Bilder,
Erwin N. Griswold,
Amici Curiae.

November, 1942.